COURT OF APPEAL FOR ONTARIO

CITATION: Clayton v. Canada (Attorney General), 2024 ONCA 581
DATE: 20240724
DOCKET: COA-23-CV-0026

Huscroft, George and Favreau JJ.A.

BETWEEN

William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcone of Delaware Inc.

Applicants (Appellants)

and

Attorney General of Canada

Respondent (Respondent)

Gregory J. Nash, Brent R.H. Johnston, John Terry and Natasha Williams, for the appellants

Roger Flaim and Andrea Bourke, for the respondent

Heard: May 15, 2024

On appeal from the judgment of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated November 24, 2022, with reasons reported at 2022 ONSC 6583.

Huscroft J.A.:

Overview

[1] This is an appeal from the order of the application judge dismissing an application to set aside an arbitration award made pursuant to Chapter 11 of the *NAFTA*. The appellants argue that the tribunal exceeded its jurisdiction and that its award violates public policy.

[2] There is no merit to this appeal. As I will explain, the appellants' jurisdictional argument is a transparent attempt to circumvent clear limits on the ability of courts to interfere with the decisions of arbitration boards, limits that this court has already explained fully: *Mexico v. Cargill, Incorporated*, 2011 ONCA 622, 107 O.R. (3d) 528 (C.A) and *Alectra Utilities Corporation v. Solar Power Network Inc.,* 2019 ONCA 254, 145 O.R. (3d) 481 (C.A). The argument that the tribunal's award violates public policy is a variation on the jurisdictional theme.

[3] I would dismiss the appeal for the reasons that follow.

Background

[4] The facts are set out fully in the decision of the application judge at paras. 2-13. It is enough for purposes of this decision to set out the facts in brief compass.

[5] The appellants sought to develop a quarry in Nova Scotia. Their proposed project required approval from both the federal and provincial Ministers of the Environment. As part of the approval process, a federal-provincial joint review panel (JRP) conducted an environmental assessment. The JRP concluded that the project would cause significant and irreversible changes that would have adverse effects on the "community's core values" and recommended that approval be denied. The federal and provincial Ministers denied approval subsequently.

[6] The appellants invoked the *NAFTA* arbitration process. At the first stage of the arbitration, the tribunal held that the respondent breached its obligations under

arts. 1102 and 1105 of the *NAFTA* by conducting a flawed environmental assessment. The respondent's application to the Federal Court of Canada to set aside this decision was dismissed: *Canada (Attorney General) v. Clayton*, 2018 F.C. 436, [2018] 4 F.C.R. 394.

[7] The appellants sought redress for the injury caused by the *NAFTA* breaches in the second stage of the arbitration. Specifically, the appellants sought damages for the profits they say they would have earned had the project gone ahead - US$440 million over a 50-year period.

[8] The tribunal found that the causal link between the *NAFTA* breach and the injury alleged by the appellants was not established. Although the appellants were deprived of an opportunity to have the environmental impact of their proposed project assessed in a fair and non-arbitrary manner, recommendation of the project was not inevitable had the assessment been conducted properly. The tribunal noted that at the first stage of the arbitration it did not decide what the outcome of a proper environmental assessment should have been, including what mitigation measures should have been prescribed. Various outcomes of a *NAFTA*-compliant process were reasonably conceivable. For example, the JRP could reasonably have: (1) concluded the project would have serious adverse effects on right whale and lobster habitats not capable of mitigation; (2) concluded the project had serious socio-economic adverse effects not capable of mitigation that could have

outweighed the expected positive effects and justified rejection of the project; or (3) recommended approval of the project subject to conditions that would render it economically unviable.

[9] Even if the proposed project had received a positive recommendation from the JRP following a *NAFTA*-compliant process, ministerial approval could have been denied, or approval could have been granted subject to conditions that rendered the project economically unviable.

[10] Thus, the tribunal concluded that the appellants failed to establish "in all probability" or with a "sufficient degree of certainty"—the standards of proof set out in international law—that they would have obtained the necessary approval for their project and would be operating profitably if the environmental assessment process had operated properly. The appellants failed to establish injury beyond deprivation of the opportunity to have a fair and non-arbitrary environmental assessment, and the tribunal awarded the appellants US$7 million in damages for this loss.

The application judge's decision

[11] The application judge dismissed the appellants' application to set aside the damage award. She noted that the tribunal identified the proper international law standard in determining causation and concluded that the correct application of that standard did not raise a "true question of jurisdiction", as set out in *Cargill*. In

the alternative, the application judge concluded that if she was wrong and the question was jurisdictional in nature, the tribunal applied the correct standard of proof and did not exceed its jurisdiction. The application judge also concluded that the award was not contrary to public policy, in that it was not morally repugnant and was not arrived at in a manner contrary to our notions of morality and justice.

The legislation and standard of review

[12] There is no right of appeal from the tribunal's award. An application to set aside the award is the exclusive recourse and is governed by s. 34 of the *Commercial Arbitration Code*, Schedule I to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17, which provides in relevant part as follows:

> **(1)** Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
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> **(2)** An arbitral award may be set aside by the court specified in article 6 only if:
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> > **(a)** the party making the application furnishes proof that:
> >
> > **(i)** a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of *Canada*; or
> >
> > **(ii)** the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> >
> > **(iii)** the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or

> contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> **(iv)** the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this *Code* from which the parties cannot derogate, or, failing such agreement, was not in accordance with this *Code*; or
>
> **(b)** the court finds that:
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> **(i)** the subject-matter of the dispute is not capable of settlement by arbitration under the law of *Canada*; or
>
> **(ii)** the award is in conflict with the public policy of *Canada*
>
> [emphasis added].

[13] Section 34 imposes strict limits on the ability of courts to interfere with arbitration awards. Subsection 34(2)(a)(iii) makes clear that a court may set aside the tribunal's award only if the appellants establish that it determined matters beyond those that were submitted to the tribunal for arbitration. "True jurisdictional questions" is a term that has been used to describe the limited nature of reviewable error under s. 34(2)(a)(iii), and the standard of review for such errors is correctness. However, as I will explain below there is good reason to stick to the wording of the legislation that authorizes the court to set aside an arbitration award under s. 34(2)(a)(iii).

[14] An award may also be set aside if it is in conflict with the public policy of Canada under s.134(2)(b)(ii). This is a mixed question of law and fact and is subject to review on the deferential palpable and overriding error standard.

DISCUSSION

The issues on appeal

[15] The appellant abandoned the procedural fairness argument it made in the court below but renews the other two arguments it made before the application judge. According to the appellants:

1. The tribunal "exceeded its jurisdiction" by failing to determine causation on the balance of probabilities standard required by international law; and
2. The tribunal's decision conflicts with the principles of adjudicative fairness and fundamental justice and so conflicts with the public policy of Canada.

The limited nature of jurisdictional intervention

[16] This court emphasized the limited scope of judicial oversight under s. 34(2)(a)(iii) in *Cargill*, at para. 47:

> [C]ourts are to be circumspect in their approach to determining whether an error alleged under art. 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not,

> advertently or inadvertently, stray into the merits of the question that was decided by the tribunal.

[17] In *Alectra* the court was concerned with domestic rather than international arbitration but considered an almost identical provision in the *Arbitration Act*, s. 46(1)(3). Again, the court emphasized the limited scope of judicial oversight, paras. 25-27:

> In order to succeed on an application to set aside an arbitration award, an applicant must establish either that the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the arbitration agreement.
>
> …
>
> In short, s. 46(1)3 requires that arbitrators act within the bounds of the authority granted by the arbitration agreement pursuant to which they are appointed – no less, but no more. Section 46(1)3 is not an alternate appeal route and must not be treated as such.

[18] There is no room for doubt as to this court's approach to commercial arbitration: review under s. 34(2)(a)(iii) of the *Code* or s. 46(1)(3) of the *Arbitration Act* is *not* an appeal. It is not an occasion for courts to review final and binding arbitration awards for either correctness or reasonableness. In order to intervene, the court must identify what *Cargill* described as a "true jurisdictional question". That term, and in particular the modifier "true", is intended to emphasize the limited scope of judicial oversight. The modifier "true" is necessary because of the

problems inherent in the concept of jurisdiction itself, in particular its amenability to manipulation.

[19] Courts must not permit final and binding arbitration awards to be undermined by spurious jurisdictional arguments. The limited review contemplated by s. 34(2)(a)(iii) of the *Code* cannot be permitted to expand beyond its legitimate boundaries.

The tribunal's award does not decide matters beyond the scope of the submission to arbitration

[20] The appellants' burden under s. 34(2)(a)(iii) of the *Code* is to establish that the tribunal's award "contains decisions on matters beyond the scope of the submission to arbitration".

[21] The appellants submit that the tribunal failed to determine causation on the balance of probabilities standard of proof it was required to apply and instead "applied a standard of proof unknown to international law"—essentially a higher standard akin to proof beyond a reasonable doubt. In so doing, the appellants submit that the tribunal "exceeded its jurisdiction":

> The Tribunal's causation analysis was nine paragraphs long. The Tribunal failed to determine what, "in all probability," would have happened but for Canada's breach. Instead, it adopted hypothetical scenarios of outcomes which "could" have happened. Because these scenarios were "reasonably conceivable" or "not impossible," the Tribunal concluded that the [appellants]

> had not met the balance of probabilities standard. In effect, this required the [appellants] to prove that no other outcomes were "conceivable" or "possible." That is different than proving the approval … [T]he Tribunal paid lip service to the required standard of proof but what it actually applied was a standard akin to proof beyond a reasonable doubt.

[22] There is no question that the tribunal identified the correct standard of proof. That being so, how could the tribunal be said to have decided a *matter* beyond the scope of the submission to arbitration? The answer, according to the appellants, is that error in applying the law in the course of deciding the damages question may constitute a failure by the tribunal to apply the law at all - a matter going to jurisdiction, as opposed to a misapplication of the law of damages within jurisdiction, which is not subject to review.

[23] This is a fine distinction, to say the least. It suggests that an error by a tribunal made in the course of deciding a matter remitted to it - in other words, an error *within* the tribunal's jurisdiction - may at some point become so substantial that it leads the tribunal to decide something other than the matter remitted to it, and so act beyond its jurisdiction.

[24] The appellants' argument invites the court to scrutinize the tribunal's award for an error of law that is otherwise immune from appeal or review and, if it finds one, to elevate it into a jurisdictional error - an error that permits the court to set the award aside - if the court considers the error sufficiently serious on some

unknown standard. On this approach, the court would find itself involved in reviewing the merits of final and binding arbitration awards routinely, without any authority permitting it to do so.

[25] This is a straightforward case. The appellants invoked the arbitration procedure to redress their damages claim. The expert tribunal was tasked with determining the quantum of damages caused by Canada's *NAFTA* breaches and set about doing so.

[26] On January 26, 2018, the tribunal identified several issues and questions related to the arbitration and invited the parties to address them in their submissions. The seventh of these specifically addressed the appellants' concerns. The tribunal posed the question: "What is the consequence under *NAFTA* and/or general international law of factual uncertainty as to whether the damage would have occurred in the absence of a breach of international law?" The tribunal directed the parties' attention to the decision of the Permanent Court of International Justice in the *Case Concerning the Factor at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (ser.A.) No. 17 (13 September 1928), which stated that reparations "must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, *in all probability*, have existed if that act had not been committed" (emphasis added). The tribunal also referred to the decision of the International Court of Justice in the *Application of the Convention*

on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), (ICJ Reports 2007), Judgment, 26 February 2007, in which the court outlined the burden on claimants to show a "sufficiently direct and causal nexus" between the wrongful act and the injury suffered: "Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a *sufficient degree of certainty* that the [injury] would in fact have been averted if the Respondent had acted in compliance with its legal obligations" (emphasis added).

[27] The tribunal understood the matter before it. The "bone of contention", as the tribunal put it, was whether, but for the *NAFTA* breaches, the appellants would have obtained the regulatory approval they required to run the quarry.

[28] The tribunal conducted a lengthy hearing and considered a massive factual record before rendering its decision. It found that the appellants failed to establish a causal link between the *NAFTA* breaches and the injury they alleged. In other words, the appellants failed to prove that their proposed project would have been approved, quite apart from the subsidiary question, whether it would have operated profitably for a 50-year period. As a result, the appellants were not entitled to the damages they claimed and were awarded a lesser amount that reflected the loss of a fair and non-arbitrary environmental assessment.

[29] The appellants parse the tribunal's award, singling out particular words and phrases and inviting the court to find that there is a "true question of jurisdiction" that requires the court's intervention. But imprecise or infelicitous expression in an arbitration award - even assuming that is what we have here - does not establish that the tribunal decided matters beyond the scope of the submission to arbitration in breach of s. 34(2)(1)(a).

[30] A fair reading of the tribunal's award makes plain that it did what it was asked to do. It decided the damages matter remitted to it, and in doing so applied the international law standard. The appellants do not accept the tribunal's analysis, but they offer no basis that would permit this court to intervene.

The tribunal's award does not conflict with the public policy of Canada

[31] The appellants repackage their jurisdictional error arguments in arguing that the tribunal's award is in conflict with the public policy of Canada. The argument is essentially as follows: Canadian public policy is rooted in the rule of law. Public policy means fundamental notions and principles of justice, and an arbitration award that is patently unreasonable, clearly irrational, totally lacking in reality, or a flagrant denial of justice is in conflict with the public policy of Canada. The tribunal failed to act judiciously. It ignored expert evidence proffered by the appellants and required the appellants to prove that outcomes other than approval of the quarry were not possible. Ultimately, the tribunal failed to value the appellants' loss of

their ability to build and operate the quarry and so allowed Canada to benefit from its own wrongdoing in denying approval of the quarry. The tribunal's award is "irrational, illogical, arbitrary, and perverse" - so "substantively unreasonable and manifestly flawed that it conflicts with the principles of adjudicative fairness and fundamental justice required by the public policy of Canada." Counsel concluded his submission by asserting that the tribunal's award "shocks the conscience of the court".

[32] This argument invokes broad principles developed in administrative and constitutional law to regulate the exercise of public authority and invites the court to set aside the tribunal's award on the basis that it is so substantively unreasonable that it conflicts with these principles.

[33] As I have said, reasonableness review is not available in the context of arbitration under the *Code,* and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 neither requires nor permits otherwise. Review under s. 34(2)(b) is for the limited purpose of determining whether an award is in conflict with public policy. This is a high standard that has nothing to do with reasonableness review. Final and binding arbitration decisions are not to be reviewed for reasonableness to determine whether they can be said to be so unreasonable as to be unenforceable on public policy grounds. The appellant's hyperbolic criticisms of the award do not change the essential nature of the

problem. The court's authority to set aside an arbitration award on public policy grounds is narrow and exceptional in nature. It is not a backdoor means of permitting reasonableness review.

[34] The public policy concept is well understood in the context of the enforcement of foreign judgments, where it also has a limited scope. In *Beals v. Saldhana*, 2003 SCC 72, [2003] 2 S.C.R. 416, the Supreme Court described it as follows, at para. 75:

> The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

The Court made these remarks in rejecting an argument similar to the one made by the appellants in this case, at para. 73:

> The appellants submitted that the defence of public policy should be broadened to include the case where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court's refusal to enforce the foreign judgment. The appellants argued that, as a matter of Canadian public policy, a foreign judgment should not be enforced if the award is excessive, would shock the conscience of, or would be unacceptable to, reasonable Canadians. The appellants claimed that the public policy defence provides a remedy where the judgment, by its amount alone, would shock the conscience of the reasonable Canadian.

[35] Conflict with public policy has been considered by this court in the context of international arbitration decisions in several cases: see e.g., *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A* (2000), 49 O.R. 414 (C.A.); *United Mexican States v. Karpa* (2005), 74 O.R. (3d) 180 (C.A.); and *Consolidated Contractors Group S.A.L. v. Ambatovy Minerals S.A.*, 2017 ONCA 939, 70 C.L.R. (4th) 51. All of these decisions endorse this statement from *Schreter v. Gasmac Inc.* (1992) 7 O.R. (3d) 608 (Gen Div.), at p. 623:

> The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.

[36] Canadian public policy is committed to respecting the resolution of disputes by final and binding arbitration, a commitment supported by the posture of judicial restraint the *Code* requires. A very high burden must be met if the court is to set aside an arbitration award on the basis that it is in conflict with Canadian public policy.

[37] This is not an appropriate case to set out the parameters of the public policy concept. In general, an award will conflict with Canadian public policy where it offends our sense of morality. For example, an award may be profoundly at odds

with Canadian conceptions of justice, such that its enforcement cannot be countenanced. Corruption is an example in this regard. Canadian courts cannot be associated with the enforcement of corrupt awards.

[38] Nothing in this case comes close to offending Canadians' sense of morality. The appellants' claim for damages flowing out of the *NAFTA* breaches was heard and determined by an expert tribunal they helped establish. The appellants simply failed to establish that they were entitled to the damages they sought - they failed to establish that, but for the *NAFTA* breaches, they would have been permitted to develop and operate the quarry they proposed. The appellants established only that they were denied the opportunity to have a fair and non-arbitrary environmental assessment of their proposal, and as a result they were compensated only for this breach. This was the tribunal's decision to make and there is no basis for the court to set its award aside.

[39] In summary, the tribunal heard and determined the matter that was remitted to it. The tribunal's award is not subject to appeal nor is it subject to review for reasonableness. The tribunal's award does not conflict with Canadian public policy.

CONCLUSION

[40] I would dismiss the appeal. The respondent is entitled to costs in the agreed amount of $100,000, all inclusive.

Released: July 24, 2024 “G.H.”

“Grant Huscroft J.A.”
“I agree. J. George J.A.”
“I agree. L. Favreau J.A.”